IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1400 OF 1994

Sunil Raosaheb Narke ...Petitioner

Vs.

Air India & Anr. ...Respondents

Ms Neeta Karnik for the Petitioner.
Mr Z. Behramkamdin i/by Mulla & Mulla for the Respondents.

CORAM : SMT. RANJANA DESAI AND SHRI A. S. OKA, JJ.

DATE ON WHICH JUDGMENT IS RESERVED : DECEMBER 19,2005.

DATE ON WHICH JUDGMENT IS PRONOUNCED: JANUARY 13, 2006.

JUDGMENT: (PER A.S.OKA, J):

1. This is an unfortunate case where the Petitioner was denied employment by the first Respondent-Air India on the ground that he is a physically handicapped person. The Petitioner was denied employment prior to coming into force of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as the said Act of 1995).

2. The Petitioner has obtained a diploma in mechanical engineering. The Petitioner completed the said diploma course through the Government Polytechnic at Aurangabad. The Petitioner passed the examination

conducted by the board of Technical Examinations, Maharashtra State in August 1991 and secured 56.28 per cent marks. At the age of one and half years the Petitioner was affected by polio. The polio resulted in post-polio paralysis of the left leg of the Petitioner. The disability of Petitioner is assessed at 40 per cent by the All India Institute of Physical Medicine and Rehabilitation, Bombay established by Ministry of Health and Family Welfare, Government of India. The Petitioner, on the basis of the said certificate applied for registration with Special Employment Exchange for physically handicapped established by the Government of Maharashtra and was registered on 23rd September, 1992 with the said employment exchange. In the meanwhile, the Petitioner secured a job of Trainee Quality Control Engineer with a private Company at Nasik.

3. It appears that Manager, Establishment Engineering of the first Respondent-Air India issued a communication dated 16th July, 1993 to the Special Employment Exchange for physically handicapped calling for the names of the suitable candidates holding diploma in mechanical/ electrical/ industrial/ electronics engineering for recruitment as trainee technician. Accordingly, the Employment Officer of the Special Employment Exchange forwarded names of nine candidates

including the Petitioner to the first Respondent. While forwarding the names in the prescribed format, the nature of physical handicap of the candidates was also incorporated by the Employment Officer. Accordingly, Petitioner appeared for the written test and interview. The Petitioner was called upon to attend the medical examination. By letter dated 06th January, 1994, the Manager, Establishment of the first Respondent informed the Petitioner that after written test and interview, he has been found as a suitable candidate for appointment to the post of the trainee technician subject to the Petitioner being found medically fit by the Medical Officer. By communication dated 31st January, 1994, the Manager- Establishment Engineering of the first Respondent informed the Petitioner that the Petition has been declared medically unfit by the Medical Officer and, therefore, he cannot be considered for employment.

4. By letter dated 04th February, 1994 the Petitioner pointed out to the first Respondent that he does not suffer from any abnormality except post-polio paralysis of left lower limb. A request was made by the said letter by the Petitioner to consider his case even under the physically handicapped category. The Petitioner made two more representations to the first Respondent by the letters dated 07th April, 1994. The

Manager-Establishment Engineering of the first Respondent informed the Petitioner that there was no reservation for physically handicapped in the category of trainee technician. It was stated that the Petitioner has been declared unfit by the Medical Officer with reference to general standards of the medical fitness prescribed for the post of trainee technicians and therefore the first Respondent was unable to help the Petitioner. Another representation was addressed by a non-government organisation by name "Apang Maitri" on 10th May, 1994 to the Manager-Establishment Engineering Department of the first Respondent. As there was no response from the first Respondent, the Petitioner filed this Petition under Article 226 of the Constitution of India for various reliefs.

5. In the Writ Petition a contention has been raised by the Petitioner that in terms of office memorandum dated 04th November, 1997 issued by the Government of India certain posts ought to have been reserved for physically handicapped. It is submitted that the Petitioner was sponsored by Special Employment Exchange which is having its own medical board and therefore, the first Respondent ought not to have compelled the Petitioner to undergo a medical examination. It is submitted that the Petitioner

notwithstanding his physical handicap was in a position to perform the duties of the post of trainee technician.

6. The Respondent No.1 filed an affidavit-in-reply of one Paul Lakra, the Senior Industrial Relations Manager of the first Respondent. It is pointed out in the affidavit that by an office memorandum dated 04th November, 1997, the Government of India directed reservation of one per cent of the posts in Group C and Group D for orthopaedically handicapped persons. It is stated that the post of trainee technician falls in category II which corresponds to Group B and therefore, reservation is not applicable to the post of trainee technician. It is stated in the affidavit that the Petitioner will not be able to perform the duties of the trainee technician with his physical handicap. Reliance is placed on medical standards for recruitment prescribed by the first Respondent. It is stated that in pre-employment medical examination it was found that the Petitioner has chronic residual poliomyelitis affecting his left lower limb. It is submitted in the affidavit-in-reply that the Petitioner is not fit to hold the post of trainee technician.

7. The learned Counsel appearing for the Petitioner has invited our attention to various documents

annexed to the Petition and to the affidavit-in-reply. The learned Counsel placed on record a copy of the report of the standing committee on identification of jobs for handicapped in Group A and Group B posts for the physically handicapped. The learned Counsel without prejudice to the contention of the Petitioner that post of trainee technician falls in Group C posts submitted that the said standing committee has identified certain posts in Group A and Group B in the Public Sector Undertakings including the first Respondent as suitable for the physically handicapped and the said report has been accepted by the Government of India. She placed reliance on decision of the Apex Court reported in **AIR 1993 Supreme Court Page 1916 (National Federation of Blind V. Union Public Service Commission)** which shows that the said report was accepted by the Government of India. The learned Counsel pointed out that the classification into group of posts relied upon by the Respondent No.1 in its affidavit-in-reply is for the purposes of maintenance of roster for the Scheduled Castes and Scheduled Tribes. She submitted that in any event the statement showing the revised regrouping of posts does not indicate that the post of trainee technician is either a Group A or Group B post. The learned Counsel submitted that the Petitioner is entitled to a direction enjoining the first Respondent to give

employment to the Petitioner.

8. On the earlier date, the learned Counsel appearing for the Respondents fairly stated before us that he will ascertain from his client as to whether the Petitioner can be accomodated by offering a suitable job. However, today the learned Counsel stated that with best possible efforts made by him, he is unable to persuade the first Respondent to make a suitable job available to the Petitioner. He, therefore, argued the case on merits and submitted that there is no reservation for the handicapped in the Group A and Group B posts. He pointed out relevant documents annexed to affidavit-in-reply and submitted that as per the medical norms accepted by the first Respondent, the Petitioner is not physically fit and suitable for the post of trainee technician. He, therefore, submitted that no interference was called for in writ jurisdiction of this Court under Article 226 of the Constitution of India.

9. We have considered the submissions. The communication dated 25th August, 1993 made by the Employment Officer of the Special Employment Exchange for physically handicapped to the Manager-Establishment Engineering of the first Respondent shows that list of suitable candidates was invited from the said Employment

Exchange by the first Respondent for appointment to the posts of trainee technician. It appears that list of candidates holding diploma in engineering was invited by the first Respondent. Alongwith the said communication, the said Special Employment Exchange forwarded names of the nine candidates to the first Respondent in prescribed format. The prescribed format in which the names were sent also indicates the nature of the disabilities suffered by the nine candidates including the Petitioner. It is an admitted position that the Petitioner appeared for the written test and interview and was found suitable. Exhibit 6 annexed to the affidavit-in-reply of the Respondent No.1 shows that when the Petitioner appeared for pre-employment medical check up, it was found that the Petitioner's left leg is shorter by one inch and there is wasting of thigh and calf muscles by almost four inches. It is stated that compared to the right leg, the affected limb has only thirty per cent power. It is pertinent to note that the first Respondent must be fully aware that the Petitioner is physically handicapped as his name was forwarded by the Special Employment Exchange for physically handicapped. The first Respondent invited the names of the candidates from the Special Employment Exchange possessing the diploma in mechanical/ electrical/ industrial/ electronics engineering for the post of trainee technicians. The

list forwarded by the Special Employment Exchange also discloses to some extent the nature of physical disability of the Petitioner in as much as it indicates that the Petitioner is orthopaedically handicapped. Knowing full well that the Petitioner was orthopaedically handicapped candidate, he was called for written test and interview and was found suitable. After having called the Petitioner for written test and interview knowing fully well that the Petitioner suffers from orthopaedic handicap, it is regrettable that the Petitioner was not selected on the ground that he is medically unfit only as a result of his physical handicap.

10. It is the contention of the first Respondent that there is a reservation of one per cent for orthopaedically handicapped persons for the posts in Group C and Group D and there is no such reservation in Group A and Group B posts. Reliance is placed on Exhibit 1 to the affidavit-in-reply to show that the post of trainee technician falls in Clause II/Group II mentioned in Exhibit 1. The reliance is also placed on letter dated 20th December, 1980 issued by Ministry of Tourism and Civil Aviation by which regrouping of the posts as per the statement attached to the said letter was approved by the Government of India. A contention has been raised in affidavit-in-reply that the post of

trainee technician appears at item No.5(iv) in the statement annexed to the said letter which is a Group II post equivalent to Group B. It is pertinent to note that the statement enclosed with communication dated 20th December, 1980 is a statement showing revised regrouping of the posts for maintenance of roster for Scheduled Castes and Scheduled Tribes in Air India. That statement does not show grouping of various posts for the purposes of reservation for orthopaedically handicapped. In the said statement in the last column Groups A, B, C and D have been mentioned. Conspicuously, against the post of trainee technician, no specific group has been mentioned in the last column. Thus, there is hardly any material on the record to show whether the post of trainee technician falls in Group A and B or Group C and D.

11. At this stage, it is necessary to advert to the report of the standing committee established by the Government of India on identification of jobs for handicapped. By order dated 09th March 1984, the Government of India constituted a Standing Committee to review the identification of the jobs reserved by various Ministries/Departments and Public Sector Undertakings in respect of Group C and D posts for physically handicapped persons. By further order dated 30th December, 1985, the Government of India directed that the Standing Committee

constituted under the order dated 09th March, 1984 shall undertake the work of identification of jobs suitable for handicapped in for Group A and B posts in Government and Public Sector Undertakings. The report of the said Standing Committee indicates that the committee has identified posts in Group A and Group B which are suitable for handicapped persons both in Government Service as well as in the employment of the Public Sector Undertakings. The report shows that the standing committee examined the question of identification of jobs for handicapped in Group A and B posts even on the establishment of the first Respondent which was a Public Sector Undertaking. The report shows that various posts of Mechanical Engineers were identified for handicapped including the posts Executive Engineer, Workshop Incharge, Mechanical Engineer, Designer, Assistant Engineer, Surveyor, Draughtsman, Assistant Foreman (Mechanical).

12. Our attention was invited to the decision of the Apex Court in the case of National Federation of Blind (Supra). In the said decision, the Apex Court referred to the recommendations of the committee by which certain posts were recommended as suitable amongst Group A and Group B posts for physically handicapped. The said judgment records that the report of the committee was

accepted by the Government of India. Thus, it is apparent that certain posts to be held by mechanical engineers in Group A and Group B have been identified as suitable for orthopaedically handicapped candidates.

13. At this stage, a reference will have to be made to the provisions of said Act of 1995. The said Act came into force with effect from 07th February, 1996. Section 32 and 33 of the said Act of 1995 are relevant for the purposes of this Petition. The said sections read thus:

> **32. Identification of posts which can be reserved for persons with disabilities.-** Appropriate Government shall-
>
> (a) identify posts, in the establishments, which can be reserved for the persons with disability;
>
> (b) at periodical intervals not exceeding three years, review the list of posts identified and up-date the list taking into consideration the developments in technology.
>
> **33. Reservation of posts.-** Every appropriate

Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from-

(i) blindness or low vision;

(ii) hearing impairment;

(iii) locomotor disability or cerebral palsy,

in the post identified for each disability:

. Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

Section 2(k) defines what is establishment. The said definition reads thus:

(k) "establishment" means a corporation established by or under a Central Provincial or State Act, or an authority or a body owned or controlled or aided by the Government or a local authority or a Government company as

defined in Section 617 of the Companies Act 1956 (1 of 1956) and includes Departments of a Government;

The first Respondent -Corporation was incorporated under the Air Corporations Act, 1953. By virtue of the provisions of the Air Corporations (Transfer of Undertakings and Repeal) Ordinance, 1994 the assets and liabilities of the first Respondent have been vested in Air India Ltd. It is true that when the case of the Petitioner was considered for recruitment, the said act of 1995 was not on the statute book. A meeting convened by the Economic and Social Commission for Asian and Pacific Region at Beijing on 01st to 05th December, 1992 adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asia and the Pacific region. India is a signatory to the said proclamation. The said Act of 1995 has been enacted with the object of implementing the said proclamation. One of the objects incorporated in the statement of objects and reasons of the said Act of 1995 is to spell out the responsibility of the State towards the employment of the persons with disabilities. That is the reason why we find that section 32 of said Act of 1995 mandates the appropriate Government to identify the posts in establishments which can be reserved for the persons with disabilities. Section 33 mandates that every appropriate

Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent shall be reserved for persons suffering from locomotor disability or cerebral palsy. Section 34 provides that the appropriate Government may, by notification, require that from such date as may be specified, the employer in every establishment shall furnish such information or return as may be prescribed in relation to vacancies for persons with disability that have occurred or are about to occur in that establishment to such Special Employment Exchange as may be specified. Section 38 enjoins the appropriate Government and local authorities to formulate schemes for ensuring employment of persons with disabilities, and such schemes may provide for regulating the employment of the persons with disabilities. We are conscious of the fact that when the vacancy arose to the post of trainee technician in the year 1993, the said Act of 1995 was not in force.

14. As found by us, there is no material on record to come to a definate conclusion that the post of trainee technician is either Group A and B post or Group C and Group D post. According to the case of the first Respondent, the said post is a Group B post. Even in Group A and Group B posts certain post have been

identified by the committee appointed by the Central Government which can be filled in by the physically handicapped persons. The report of the committee has been accepted by the Government of India. We are of the view that the establishment like first Respondent-Air India ought to have considered the case of the Petitioner sympathetically. As indicated earlier, though the Respondent No.1 was fully aware about the physical disability suffered by the Petitioner, he was called for written test and interview. In fact, the first Respondent itself called for the names of the suitable candidates from the Special Employment Exchange for physically handicapped. The Petitioner was interviewed and was found suitable. Thereafter, a stand is taken that the Petitioner is not physically fit on account of his disability. Keeping in the mind the fact that India is a signatory to the proclamation for full participation and equality for people with disabilities and considering the legislative mandate in the form of the said Act of 1995, we feel that establishment like Air India should consider the case of the Petitioner sympathetically as far as possible by offering him a job consistent with the status of the Petitioner as a holder of diploma in mechanical engineering awarded by the Board of Technical Examinations of the Government of Maharashtra. We expect the first Respondent to identify a suitable employment

opportunity to the Petitioner considering his educational qualification. While considering the case of the Petitioner, the concerned authorities of the first Respondent will keep in mind that the Petitioner appeared for interview and written test only because his name was forwarded by the Special Employment Exchange on the specific request made by the first Respondent. Though we are unable to issue a writ of mandamus, we hope and trust that the first Respondent will consider the case of the Petitioner in the perspective of the policy of the Government of India of making available equal opportunities to the persons with disabilities in the matters of employment and will as far as possible offer him a suitable employment. The Petitioner will be free to submit within a period of two weeks from today to the first Respondent documents showing experience, if any, acquired by the Petitioner during the pendency of the Petition.

15. We accordingly dispose of this Petition by directing the first Respondent to consider the case of the Petitioner sympathetically in accordance with the observations made by us in the paragraph 14.

Smt Ranjana Desai, J

Shri A.S. Oka, J.